In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-373

DENNIS E. KONIECKI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the government failed timely to republish the schedules of controlled drugs; that the court of appeals affirmed on a theory upon which the jury was not instructed; and that there was insufficient evidence to support the convictions of petitioners Wells and Rusniak.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to import marijuana into the United States, in violation of 21 U.S.C. 963 and 952(a). Petitioner Koniecki was sentenced to a term of five years' imprisonment; petitioners Tefka and Rusniak to terms of four years' imprisonment; petitioner Frederick to a term of three years' imprisonment; and petitioner Wells to a term of three years' imprisonment, the first six months to be served and the balance suspended in favor of probation. The court of appeals affirmed (Pet. App. 1a-7a).

The evidence at trial, as set forth by the court of appeals (Pet. App. 1a-2a), showed that in January 1972 petitioner Frederick informed Arthur Price, an airplane pilot and unindicted co-conspirator, that Rusniak knew two people who could put together a deal to fly marijuana from Mexico to Florida. Subsequently Price, Frederick, Rusniak, Koniecki and Tefka agreed to such a plan.

In the first week of February 1972, Frederick, Price and Rusniak met at Frederick's house in Fort Myers, Florida, and discussed the pooling of their fees and the leasing of an airplane. Later that month Tefka advanced Frederick $2,500 to lease a plane, which Frederick proceeded to obtain with the assistance of Price. Thereafter, Tefka, Frederick and Price inspected a number of airstrips around Fort Myers and decided that Cape Hayes Airport would be a suitable location for landing with the load of marijuana.

After delays caused by mechanical problems with the first aircraft, Price and Koniecki, having decided to cut Rusniak and Frederick out of the deal, rented another plane and, with Wells and Tefka, flew to Houston, Texas. From Houston, Wells and Tefka took a commercial flight to Guadalajara, Mexico, while Price and Koniecki flew there in their rented plane. On March 7, 1972, Price, Tefka and Koniecki met with three other, unidentified co-conspirators and set the time and place for the marijuana pickup.

On March 30, 1972, after making the pickup, Price and Koniecki left Mexico in their rented aircraft bound for Provo, Utah. Due to lack of fuel, they were forced to land in Prescott, Arizona, where they rented a car, to which they transferred the marijuana. Koniecki was to

drive the car to Flagstaff, Arizona, while Price was to fly back to Mexico so he could clear Mexican and United States Customs. During a stop in Banning, California, Price was arrested by United States Customs agents and agreed to cooperate.

Price went to Chicago and was met there by Tefka and Wells. Wells drove Price and Tefka through Chicago, following Tefka's instructions, in a manner calculated to evade any cars that might be following them.

On April 12, 1972, Price met with Tefka, Koniecki and Wells at Tefka's apartment; Koniecki said that the marijuana was in Chicago and was in the process of being sold. The next day Koniecki paid Price $8,210.

In May 1972 Frederick told Price that he felt that he and Rusniak had not received their share of the money. Price gave Frederick a check for $100. Shortly thereafter petitioners were arrested.

I. Petitioners contend that 21 U.S.C. 812(a)[1] required the Attorney General to update and republish the schedules of controlled substances on October 27, 1971, and that the failure so to republish until May 12, 1972, meant that during the conspiracy (January 1972-May 1972), there was no outstanding prohibition of marijuana. Simply stated, petitioners contend that they were convicted of an offense, the prohibition against which had lapsed.

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[1]Section 812(a) reads as follows:

> There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. *The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.* [Emphasis supplied.]

The date of enactment was October 27, 1970. Marijuana was listed by the statute in Schedule I. 21 U.S.C. 812(c).

However, the language of 21 U.S.C. 812(a) creates a duty to update and republish the schedules of controlled substances "on a semiannual basis *during* the two-year period beginning one year after the date of enactment * * *." The two-year period referred to began on October 21, 1971. An ordinary reading of the language of the statute does not require republication on that date. October 27, 1971, was the first date of a two-year period *during* which semiannual republication was to occur. Thus, the first republication during that two-year period was required on April 27, 1972. Until that date, the schedules set forth in the statute itself (21 U.S.C. 812(c)) were controlling. *United States* v. *Nocar*, 497 F. 2d 719 (C.A. 7), certiorari denied, November 25, 1974, No. 74-131. Accordingly, during the period of the conspiracy marijuana was a Schedule I controlled substance.

Petitioners rely on the policy of lenity. That policy, however, is applied only to statutes that can be read equally well in ways that prohibit or fail to prohibit the subject conduct. See *United States* v. *Cook*, 384 U.S. 257, 262-263. It requires a strained construction of the statute to compel republication on October 27, 1971, and the policy of lenity does not control.

2. Petitioners contend that the court of appeals affirmed on a theory not charged by the district court. The district court had instructed the jury to convict only if it found that the substance imported, in addition to being marijuana, possessed hallucinatory properties.[2] Petitioners now claim that in reliance on their

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[2]The district court charged (Tr. 839):

> If the Government has not proved beyond a reasonable doubt that the substance in question is included in the definition [relative to the hallucinggenic properties of marijuana] that I have read, you should find the defendants not guilty.

knowledge that the district court would so charge, and on their belief that there was no evidence to support an inference that the imported marijuana had hallucinatory properties, they changed their strategy of defense, and did so to their detriment in light of their conviction (Pet. 11-14).

The court of appeals properly held that, in a conspiracy prosecution, the government had no burden to prove that the substance fell within the statutory definition (Pet. App. 4a). A conspiracy to commit a crime is a different offense from the substantive crime itself. *United States* v. *Rabinowich*, 238 U.S. 78; *United States* v. *Fellabaum*, 408 F. 2d 220 (C.A. 7), certiorari denied, 396 U.S. 858. Therefore, the court held that it was not necessary for the government to prove that the imported marijuana was hallucinatory. The government's only burden was to prove an agreement to import marijuana illegally. Cf. *Britton* v. *United States*, 60 F. 2d 772 (C.A. 7), certiorari denied, 287 U.S. 669.

Petitioners did not rely to their detriment on the district court's instruction that the marijuana be hallucinatory. By acceding to petitioners' request and including the charge at issue, the trial court actually placed a greater burden upon the government than is required in a conspiracy prosecution. Far from prejudicing petitioners, this higher standard of proof could work only in their favor. See *Killian* v. *United States*, 368 U.S. 231, 258; *Rogers* v. *United States*, 367 F. 2d 998, 1001 (C.A. 8), certiorari denied, 386 U.S. 943. They should not be heard now to complain of error they induced themselves for their own supposed benefit.

Petitioners' contention that their defense tactics at trial might have been different had the court not given their requested erroneous instructions is speculative. Petitioners were free to adopt any strategy they chose and were not hampered by the district court's error. Although petitioners may have believed that they had discovered a flaw in the government's case, the district court's instruction did not either compel or induce them to rest their case solely on that "flaw"; they were free to find and develop others, if there were any.

Finally, the court of appeals' decision is, contrary to petitioners' contention, consistent with the trial court's instructions. Immediately after the charge at issue, the trial court correctly instructed the jury on the crime of conspiracy (Tr. 840). Thus, the law of conspiracy was fully and clearly presented. *Britton* v. *United States, supra*, 60 F. 2d at 773-774. Although the conspiracy instruction may have been inconsistent with the instruction on the composition of the drug imported, this did not prejudice petitioners because the jury was properly told that the government need not prove that the object of the conspiracy had been achieved successfully. Under this correct conspiracy instruction, the district court's earlier and incorrect "hallucinatory properties" instruction was surplusage.

3. Petitioner Wells contends that the evidence was insufficient to support her conviction for conspiracy. However, on appeal from a verdict of guilty the government is entitled to the benefit of all inferences which reasonably can be drawn from the proven facts. *Glasser* v. *United States*, 315 U.S. 60, 80. Here the proven facts reasonably support the jury's determination that Wells was a knowing participant of the conspiracy.

Wells was present during many of the critical stages of the conspiracy—from its original planning stage until the time for the distribution and sale of the marijuana. She was at the Holiday Inn in Tampa, Florida, in the same room with Tefka, Koniecki and Price, during a discussion concerning the necessity of postponing the trip to Mexico due to the plane's mechanical problems and the problem of Tefka and Wells getting visas for the trip (Tr. 73-74). Later, while driving to Frederick's house in Fort Myers, Price, Koniecki, Tefka and Wells stopped at the Cape Hayes Airport to inspect the plane. All four of them left the car and inspected the runway, and Koniecki remarked that it was an ideal airport because there was very little traffic on the road adjoining it (Tr. 75-76). Wells and Tefka took a commercial flight to Mexico, where they met Price and Koniecki at the Guadalajara Hilton (Tr. 93-94, 99-100).

At a meeting in Guadalajara on March 26, 1972, between Price, Tefka and Koniecki, Tefka told Price that Wells was back in Chicago trying to round up more money (Tr. 129). After the marijuana was imported, Price returned to Chicago and entered a car with Tefka, which was being driven by Wells. Under instructions from Tefka, Wells drove around town in an erratic manner calculated to evade any cars that might be following them, while Tefka and Price engaged in a conversation in which Tefka told Price he did not know if Price was trustworthy because he might be working for federal agents (Tr. 170-171, 509). Finally, on April 12, 1972, Price, Koniecki, Tefka and Wells met at Tefka's apartment, where Koniecki said that the marijuana was being sold in Chicago and that they should have their money in the morning (Tr. 197-198).

Participation in a criminal conspiracy need not be proved by direct evidence. It may be inferred from the circumstances, acts and conduct of the parties. *Glasser* v. *United States, supra*, 315 U.S. at 80; *United States* v. *Fellabaum, supra*, 408 F. 2d at 224. The evidence here was sufficient to support the jury's finding that Wells knew of and participated in the conspiracy.

4. Petitioner Rusniak also contends that the evidence was insufficient to support his conviction for conspiracy. He claims that all he did was introduce a willing seller to a willing buyer. But once again the evidence, in the light most favorable to the government, shows that Rusniak was intimately involved in the initial planning of the conspiracy and that he had a definite financial stake in the venture.

In January 1972 Frederick called Price twice to inform him that Rusniak knew two persons who were interested in a "deal" (Tr. 46-48). Subsequently, Rusniak met Price at Chicago's O'Hare Airport and told him that these people were reliable and the scheme to "fly grass" into the United States should work well (Tr. 49-50). On January 27, 1972, Rusniak introduced Price to Koniecki and Tefka at Rusniak's apartment, where they discussed flying marijuana out of Jamaica and then Mexico (Tr. 52-54).

On January 28, 1972, they all met again, and Price was told that Rusniak would be transporting the marijuana by Winnebago from Florida to Chicago (Tr. 54-55). In the first week of February 1972, Frederick called Price and told him that "John" (Rusniak's given name) had called and said all was going well, and that he would be in Florida soon to look for an airport. Frederick also told Price that John was to receive $5,000 for driving the marijuana from Florida to Chicago (Tr. 55-56). On February 10, 1972, Price, Frederick, and Rusniak met at Fred-

erick's house and decided to pool their fees and split it three ways (Tr. 56-57). Finally, on May 13, 1972, Frederick told Price that he felt that he and John had not received their share of the money (Tr. 201-202). This evidence was sufficient to support the jury's determination that Rusniak was a knowing participant in the conspiracy.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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